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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALAN EDGAR HARRIS,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a lawyer entitled to due process of law at any stage of an attorney disciplinary proceeding prior to filing of a formal complaint for disciplinary action against him in an appropriate court?

2. Was Harris, a Maryland lawyer, deprived of due process of law in the Inquiry Panel and Review Board stages of disciplinary proceedings conducted against him by the Attorney Grievance Commission of Maryland prior to filing of a formal complaint for disciplinary action in the Court of Appeals of Maryland?

3. Did any or all of the following deprive Harris of due process of law:

(a) Bar Counsel's informing the Inquiry Panel, before it heard the complaints against Harris, of prior hearings and warnings issued to Harris in three other cases not related to or

connected with the four complaints which the panel was to hear;

(b) Lack of any right or opportunity for Harris to participate in selection of the persons constituting the Inquiry Panel which was to hear the complaints against him;

(c) Assignment of three entirely separate and unrelated additional complaints to a single Inquiry Panel after that panel had been designated to hear one specific complaint;

(d) Lack of any right or opportunity for Harris to participate in proceedings of the Review Board, including selection of participating members thereof;

(e) The Attorney Grievance Commission's acting as the agency investigating and prosecuting the complaints against Harris and as the agency which selected or participated in selection of persons constituting the Inquiry Panel

which was to hear those complaints and the Review Board which was to determine whether a petition for disciplinary action based on those complaints would be filed against Harris in the Court of Appeals of Maryland;

(f) Bar Counsel's engaging in ex parte communication with the Inquiry Panel chairlady, after reading the panel's report, regarding the sanction, if any, recommended or intended by the panel in two of the cases presented to it; and

(g) Bar Counsel's including, in the petition for disciplinary action filed in the Court of Appeals of Maryland, a charge, viz. alleged misappropriation of client's funds, with which Harris was not charged before the Inquiry Panel and as to which that panel made no findings?

LIST OF PARTIES

Alan Edgar Harris and the Attorney Grievance Commission of Maryland were the only parties to the case in the Court of Appeals of Maryland and in the Circuit Court for Baltimore City, to a judge of which the case was referred for hearing, on the petition for disciplinary action filed in the Court of Appeals, for finding of facts and conclusions of law. No corporate parties were involved.

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Petitioner, Alan Edgar Harris ("Harris"), prays that a writ of certiorari issue to review the judgment (order) of the Court of Appeals of Maryland, entered on July 30, 1987 in an attorney disciplinary proceeding brought against Harris in that court and there entitled Attorney Grievance Commission of Maryland v. Alan Edgar Harris, Misc. Docket (Subtitle BV), No. 51, September Term, 1985, imposing upon Harris

as a sanction for violation of certain disciplinary rules a suspension from the practice of law in Maryland for six months, beginning on August 29, 1987, and requiring him to pay two-thirds (which amounted to $2,924.16) of the costs in the case and entering judgment for that sum against him in favor of the Attorney Grievance Commission of Maryland ("the AGC").

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at ____ Md. ____, 528 A.2d 895 (1987). A copy of that opinion is contained in the separate Appendix to this petition. (App. 1).

The "Memorandum of Finding of Fact and Conclusions of Law" filed by the Circuit Court for Baltimore City (Attorney Grievance Commission of Maryland v. Alan Edgar Harris, DP-38, No. 51), to a judge of which the petition for disciplinary action filed by the AGC in the Court of Appeals of Maryland was referred for hearing, findings

of fact and conclusions of law, is not published (as far as Harris is aware). A copy of that memorandum is contained in the separate Appendix to this petition. (App. 35).

JURISDICTION

The judgment (order) of the Court of Appeals of Maryland was entered on July 30, 1987. (See slip opinion (App. 1) and letter from the clerk of that court to counsel, dated July 30, 1987. (App. 61).) Harris's timely motion for reconsideration, filed on August 31, 1987, was denied on September 8, 1987. (See letter from the clerk of the Court of Appeals of Maryland to counsel dated September 9, 1987. (App. 62).) The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3) and Rules 20.2 and 20.4 of the Rules of this Court, effective June 30, 1980, as amended to January 1, 1987.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. 14, provides, in part pertinent hereto:

> "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Harris has been a member of the Maryland Bar since 1960 (and of the New York Bar since 1956). On or about February 27, 1986, the AGC, acting through Bar Counsel, filed a petition for disciplinary action against Harris in the Court of Appeals of Maryland, alleging that Harris had engaged in misconduct, in violation of disciplinary rules governing Maryland lawyers. Bar Counsel, in filing the petition, acted at the direction of the AGC's Review Board. The charges involved complaints by three of Harris's clients.

(Under Maryland's attorney disciplinary system, Bar Counsel first investigates a complaint against an

attorney. If further action is believed to be indicated, Bar Counsel then refers the complaint to an Inquiry Panel for hearing, findings and recommendations as to disposition. The Inquiry Panel reports to a Review Board, which directs Bar Counsel what further action to take, including whether to file formal charges against the lawyer in the Court of Appeals. When such charges are filed, the case is referred to a trial judge, in the jurisdiction wnere the lawyer practices, for hearing, findings of fact and conclusions of law, which are filed with the Court of Appeals. The parties then may file exceptions to the trial judge's findings and conclusions. The parties also may file recommendations as to sanctions. The Court of Appeals then hears counsel on the exceptions and determines the ultimate outcome of the case, including what sanctions, if any, are to be awarded. (See Md. Code, Md. Rules,

Rules BV6, BV7, BV9, BV10, BV11).)

In the instant case, the AGC investigated a complaint against Harris by one of his clients (Green) and assigned it to an Inquiry Panel for hearing. Thereafter the AGC assigned three other subsequent complaints (two of which, the respective complaints of Jacks and Jeter, survived the Inquiry Panel stage) to the same panel for hearing. None of the four complaints were in any manner related to each other.

Prior to any hearing, Bar Counsel informed the Inquiry Panel of prior hearings and warnings in three other cases, stating that there was a pattern of misconduct involved. The communication by Bar Counsel regarding prior warnings was an ex parte one.

The Inquiry Panel members were designated by the AGC. Harris did not participate in their selection.

After the Inquiry Panel held its hearing and made its report, Bar Counsel, having read that report (Harris was not then made privy to the panel's report or even advised that it had been submitted), communicated with the panel chairlady, again on an ex parte basis, regarding the sanction recommended or intended by the panel in two of the cases. (The communication involved indicated that, of the four cases assigned to the panel, "'[t]he two (2) cases referred to above [Green and Jeter] were reported as recommending that the Respondent be reprimanded. The transcript of their findings of May 6, 1985, indicated that they found the conduct such that he should not receive discipline but should receive a reprimand.'" (Slip Opinion; App. 12). Bar Counsel's communication with the panel chairlady was not made known to Harris at that time.

The Review Board subsequently directed Bar Counsel to file charges against Harris in the Court of Appeals of Maryland. Harris had no participation in the Review Board's proceedings.

When Bar Counsel filed his petition for disciplinary action against Harris in the Court of Appeals, he included therein, among his allegations setting out charges in connection with the Jacks complaint, an averment that Harris had misappropriated Jacks's funds. That charge was not among those with which Harris was presented in the proceedings before the Inquiry Panel or as to which that panel made any finding.

Harris, by motions to dismiss filed in the proceedings in the Circuit Court for Baltimore City and by exceptions filed in the Court of Appeals of Maryland, contended that the manner in which the proceedings against him were conducted before the Inquiry Panel and at the Review Board,

prior to initiation of charges against him in the Court of Appeals of Maryland, as well as inclusion in the petition for disciplinary action filed in that court of a charge of misappropriation of Jacks's funds, with which he had not been charged in the prior proceedings, separately and collectively accomplished a deprivation of his right to due process of law. The trial judge who heard the case in the Circuit Court for Baltimore City concluded that not he but the Court of Appeals of Maryland "'must determine whether or not the matters alluded to constitute sufficient grounds to dismiss the Petition.'" (Slip opinion; App. 4, n.2). The Court of Appeals held, in effect, that nothing which occurred at the Inquiry Panel or Review Board levels could amount to a denial of due process. (In that regard, the court commented, in part, that "any irregularity in the proceedings before the Inquiry Panel

and the Review Board ordinarily will not amount to a denial of due process, as long as the lawyer is given notice and an opportunity to defend in a full and fair hearing following the institution of disciplinary proceedings in this Court" (slip opinion; App. 7) and that, as long as the charges involved are sufficiently clear to inform the lawyer what he is to answer for and to defend against and there are no violations of the AGC's own guidelines and the Maryland (BV) rules regarding attorney disciplinary proceedings, "the respondent is generally precluded from contesting what occurred in the preliminary stages before the Inquiry Panel and the Review Board leading to the filing of charges in this Court." (Slip opinion; App. 10).

REASONS FOR ALLOWING THE WRIT

This case squarely presents an important question regarding the right of a lawyer/respondent in a state court disciplinary proceeding to have, in the preliminary proceedings leading up to initiation of formal disciplinary charges against him in the appropriate state court, the benefit of that due process of law which is afforded every citizen by the Due Process Clause of the 14th Amendment to the Constitution of the United States. The Court of Appeals of Maryland in effect has held, in this case as well as in others (see, e.g., the cases referred to in the slip opinion at App. 7-8), that it is not concerned in any due process sense with what may have occurred prior to initiation of formal disciplinary charges with it, so long as after such charges are filed the lawyer is told what the charges against him

are and is given an opportunity to defend. That approach, Harris respectfully suggests, is not only unfair, but unwise. It certainly provides the AGC and Bar Counsel with a blank check, to complete as they desire, with respect to anything that occurs before formal charges are filed. (And since the AGC, through its Bar Counsel, Inquiry Panel and Review Board, effectively controls whether and when such charges shall be filed, it has the ability to do what it likes for as long as it likes in any proceedings preliminary to filing formal charges and its actions in those phases of a Maryland attorney disciplinary action apparently are (presently at least) entirely immune from constitutional challenge. Of course it is in just those preliminary proceedings that critical aspects of the case, which well may make or break any subsequent formal action, are developed, delineated and fixed and the

nature of any charges to be made are determined. Harris suggests that it is grossly unfair to require a lawyer to participate in Inquiry Panel proceedings, as Maryland does, but to deny him at that level essential procedural constitutional rights, including the right to due process of law. That right is all that Harris sought. He was denied that right (including in the respects referred to hereinaoove). Hence he was denied a fair hearing before an impartial tribunal in the stages of the disciplinary proceeding against him which preceded the filing of formal charges. To consider that what happened at those earlier stages was not material, even critical, to ultimate disposition of the complaints made against him and is to be artificially separated from what occurs after formal charges are filed and allowed immunity from the constitutional guaranty of procedural

due process is to close one's eyes to the practical realities of the attorney disciplinary system involved.

The issue sought to be presented in this petition, as to a lawyer's entitlement vel non to due process of law in the initial phases of attorney disciplinary proceedings, of course potentially affects every Maryland lawyer, since it arises in the context of the Maryland attorney disciplinary system. But the issue is not limited to Maryland alone. It has potential effect upon every lawyer in every jurisdiction having an attorney disciplinary scheme similar to the one existing in Maryland, viz. a system in which peer screening and review, through agencies functioning similarly to Maryland's AGC and by bodies like the Inquiry Panel and Review Board employed in the Maryland procedure, is applied to

complaints against lawyers before formal charges are instituted. While a state certainly has broad powers to regulate the practice of law within its borders, it cannot in exercising those powers ignore the constitutional rights of individuals (including, Harris respectfully suggests, those of lawyers). Cf. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89, 11 A.L.R.3rd 1196 (1964), rehearing denied 377 U.S. 960, 84 S.Ct. 1625, 12 L.Ed.2d 505, on remand 207 Va. 182, 149 S.E.2d 265, certiorari denied 385 U.S. 102, 87 S.Ct. 754, 17 L.Ed.2d 675; N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), rehearing denied 354 U.S. 927, 1 L.Ed.2d 1441; Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796. An

attorney is entitled to procedural due process in disciplinary proceedings. In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), rehearing denied 390 U.S. 961, 88 S.Ct. 1883, 20 L.Ed.2d 874. Harris sought in the instant case nothing more than procedural due process in the stages of the disciplinary proceeding against him which preceded, led to and brought about the filing of formal charges in the Court of Appeals of Maryland. The position of that court that he is not entitled to due process in such preliminary phases of something as serious as proceedings which could have resulted in his disbarment is, he respectfully submits, egregious error, which ought not be permitted to remain uncorrected. The issue presented is portentous and pervasive enough to warrant the attention of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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October 28, 1987